76-1500

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In the Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1500

THE COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

FRANCIS X. BELLOTTI
Attorney General
S. STEPHEN ROSENFELD
Assistant Attorney General
TERENCE P. O'MALLEY
Assistant Attorney General
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
Tel: (617) 727-1014
Attorneys for the Petitioner

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THE COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Introductory Statement

The Commonwealth of Massachusetts petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the First Circuit.

Opinions Below

The opinion of the court of appeals is reported at 548 F.2d 33 and is appended hereto at pp. A-5 through A-10. The opinion of the district court is not reported and is appended hereto at pp. A-2 through A-3.

Jurisdiction

The judgment of the court of appeals was entered on January 28, 1977 and is appended hereto at p. A-11. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the application of the aircraft use tax (26 U.S.C. §4491) to a helicopter owned by the Commonwealth of Massachusetts and used for public safety purposes violates the constitutional principle of intergovernmental tax immunity?
2. Whether designation of revenue from the aircraft use tax for airport expansion and development exempts the tax from the principle of intergovernmental tax immunity?

Statute Involved

28 U.S.C. §4491.

(a) *Imposition of Tax.*—A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of—

(1) $25, plus
(2) (A) in the case of an aircraft (other than a turbine-engine-powered aircraft), 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or (B) in the case of any turbine-engine-powered aircraft, 3½ cents a pound for each pound of the maximum certificated takeoff weight.

(b) *By whom paid.*—Except as provided in section 4493(a), the tax imposed by this section shall be paid—

(1) in the case of a taxable civil aircraft described in section 4492(a)(1), by the person in whose name the aircraft is, or is required to be, registered, or
(2) in the case of a taxable civil aircraft described in section 4492(a)(2), by the United States person by or for whom the aircraft is owned.

(c) *Proration of tax.*—If in any year the first use of the taxable civil aircraft is after the first month in such year, that portion of the tax which is determined under subsection (a) (2) shall be reckoned proportionately from the first day of the month in which such use occurs to and including the last day in such year.

(d) *One tax liability per year.*—

(1) In general.—to the extent that the tax imposed by this section is paid with respect to any taxable civil aircraft for any year, no further tax shall be imposed by this section for such year with respect to such aircraft.
(2) Cross reference.—

For privilege of paying tax imposed by this section in installments, see secton 6156.

(e) *Termination.*—On and after July 1, 1980, the tax imposed by subsection (a) shall not apply.

Statement of the Case

By way of suit for refund, the Commonwealth of Massachusetts challenged the validity of applying the federal excise tax on the use of civil aircraft, 26 U.S.C. §4491, to a helicopter used by the Massachusetts State Police. Since the tax was a direct assessment on the Commonwealth for the performance of an essential function, the Commonwealth claimed that the tax levy violated the constitutional principle of intergovernmental tax immunity. Federal jurisdiction was based on 28 U.S.C. §1346(a)(1).

The United States District Court for the District of Massachusetts dismissed the complaint for failure to state a claim upon which relief can be granted. The district court held that (a) the States are not immune from federal taxation, (b) the aircraft use tax was properly classified as a user's fee, and (c) the user tax may be levied against a State, principles of intergovernmental tax immunity notwithstanding. (A-2 – A-3).

On appeal, the court of appeals affirmed the judgment of dismissal. The court declined to decide the issue of intergovernmental tax immunity and relied solely on the ground that the tax was a user charge or fee. (A-7, 548 F.2d at 35). That conclusion was based on the fact that revenue derived from the tax is intended for airport expansion and development.

Reasons for Granting the Writ

I. There Are Special and Important Reasons For Exercising This Court's Discretion To Review the Decision of the Court of Appeals.

There are essentially three special and important reasons for reviewing the decision of the court of appeals. First, in sustaining the imposition of the aircraft use tax on the Commonwealth, the court of appeals has undermined the

salutary purpose of the principle of intergovernmental tax immunity. Its assertion that user taxes are not covered by this principle is a novel concept, with broad implications, that deserves resolution by this Court. Second, this Court's recent reaffirmation of the immunity of the States from federal taxation in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) directly contradicts not only the conclusion reached by the court of appeals but its underlying attitude toward State immunity as well. Third, the judgment of the First Circuit Court of Appeals is in conflict with a recent decision on the same question by a district court for the Northern District of Georgia. Since the Georgia decision is directly appealable to this Court, there exists, in substance, a conflict between two circuits which merits plenary consideration by this Court.

The decision of the court of appeals presents a serious challenge to an integral principle in our federal-state constitutional system. The uses to which the revenue from the aircraft use tax are put are irrelevant on this score. The imposition of the aircraft use tax on the performance of police functions is necessarily a direct infringement on the sovereignty of the Commonwealth of Massachusetts.

The Commonwealth's claim of tax immunity for its State Police helicopter is based on a solid constitutional foundation. That immunity from taxation is a necessary incident of sovereignty was first formulated in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819) and recently affirmed in *United States* v. *County of Fresno*, 97 S. Ct. 699 (1977). While that line of authority involved the immunity of the federal government from state taxation, the reciprocal nature of the tax immunity doctrine is well established. *Collector* v. *Day*, 11 Wall. 113 (1870); *Indian Motorcycle Co.* v. *United States*, 283 U.S. 570 (1931). The immunity of the State Police helicopter under this doctrine is self-evident. The aircraft use tax is imposed directly on the Commonwealth

for the performance of the sovereign function of promoting the public safety. "[I]t is plain that the invalidity is due wholly to the fact that it is a State which is being taxed so as unduly to infringe, in some manner, the performance of its function as a government which the Constitution recognizes as a sovereign." *New York* v. *United States*, 326 U.S. 572, 588 (1946) (plurality opinion).

The aircraft use tax cannot be justified by reference to limitations on the tax immunity doctrine; these limitations are inappropriate in this case. For example, the Commonwealth is not claiming tax immunity for a non-essential function, which has long been held subject to federal taxation. *E.g.*, *New York* v. *United States*, *supra*, (sale of mineral water); *Helvering* v. *Powers*, 293 U.S. 214 (1934) (operation of street railway); *South Carolina* v. *United States*, 199 U.S. 437 (1905) (sale of liquor). Nor is the Commonwealth claiming tax immunity for its employees; even though the economic burden may be passed on to the State, public employees are not immune from federal taxation. *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938). These exceptions to the tax immunity principle have had the beneficial effect of producing a firm but limited content to the principle. By employing the user fee designation, the court of appeals has injected a new element of uncertainty into this area, without direct support from the decisions of this Court. (*See infra* Part II)

The second compelling reason for review is the failure of the decision to deal substantively with this Court's recent seminal statement on the "essential role of the States in our federal system of government" in *National League of Cities* v. *Usery*, 426 U.S. 833, 844 (1976). That case involved a limitation on the power of Congress to regulate interstate commerce; nonetheless, the Court's underlying recognition that Congressional authority is subject to state-oriented limitations imposed by the Constitution is identical to that

relied upon in tax immunity decisions. The Court stated that "[w]e have repeatedly recognized that there are attiributes of sovereignty attaching to every state government which may not be impaired by Congress, ..." 426 U.S. at 845. In this regard the Court referred directly to the principle of intergovernmental tax immunity stating that "this 'immunity' is derived from the sovereignty of the States and the concomitant barriers which such sovereignty presents to otherwise plenary federal authority." 426 U.S. at 844 n. 14. Thus, any discussion of the validity of applying the aircraft use tax to the Commonwealth absolutely requires that the implications of *National League of Cities* v. *Usery* be addressed. Such consideration was not afforded by the court of appeals.

The third "special and important reason" for granting certiorari in this case arises from the decision in *Georgia* v. *United States*, C.A. No. 75-1155A (N.D. Ga. April 14, 1977).[1] The district court in that case ordered a refund of the aircraft use tax as applied to aircraft owned and operated by the State of Georgia. Since that decision held that 26 U.S.C. §4491 was unconstitutional, the appeal lies directly to this Court under 18 U.S.C. §1252. The decision of the court of appeals in this case is thus in direct conflict with a decision which in effect is final in another circuit. This clear conflict demands resolution by this Court according to the principles behind Supreme Court Rule 19(b).

Under Supreme Court Rule 19, a petition for a writ of certiorari will be granted for special and important reasons. " 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially

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[1] A copy of the judgment of the district court is appended hereto at pp. A-12 – A-13. Should the United States appeal from that judgment, it should not be heard to oppose Massachusetts' petition for review. Once having asserted the importance of the issues involved, it should, to be consistent, support Massachusetts' argument to the same effect.

true where the issues involved reach constitutional dimensions, for then there comes into play regard for the court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955). The necessity for resolution of the constitutional issue presented by the imposition of the aircraft use tax on the Commonwealth transcends the particular amount of the tax involved or the single item being taxed. Moreover, the police nature of the State function being taxed provides a concrete instance for resolution of the tax immunity issue.

II. The Decision of the Court of Appeals Is In Error.

The court of appeals withdrew the aircraft use tax from the scope of the principle of intergovernmental tax immunity because it believed "that the tax here at issue is, in reality, a user charge." (A-7, 548 F.2d at 35). Its basis was the prior congressional designation that the revenue derived from the tax be used for airport development and expansion. *See* 49 U.S.C. §1742 establishing the Airport and Airway Trust Fund. The circuit court did not dispute that insofar as a distinction exists between taxes and fees, this levy is a tax. Rather, it attempted to distinguish among taxes, based on the intended use of the revenues. There is, however, no decision of this Court that states or implies that the characterization of a tax as user-oriented negatives principles of State sovereignty and permits taxation of the performance of essential State functions.

The fundamental difference between a tax and a user charge or fee is that the former is the exaction of a sovereign designed to provide revenue while the latter is that of a public agency designed to compensate the agency for the bestowing of a benefit, not shared by the public generally. *See National Cable Television Association* v. *United States*, 415 U.S. 336, 340-341 (1974). The court of appeals did not purport to find that the aircraft use tax was not a tax, but merely focussed on the use of the revenue for airport expansion and development to support the additional characterization of the tax as a user charge.[2]

Since the aircraft use tax does not even purport to be a fee charged by a public agency, the validity of such a charge should not have been discussed by the court of appeals. The Commonwealth does not challenge the validity of any of the particular fees charged by the Federal Aviation Administration. *See* 14 C.F.R. §§187.1-187.5. Nor does the application of the principle of intergovernmental tax immunity to the aircraft use tax undermine the authority for the charging of such fees. The court of appeals should therefore have proceeded directly to address the question of tax immunity.

Rather than discuss the generally accepted differences between taxes and charges or fees, the court of appeals upheld the use tax largely on the basis of a strained and inappropriate analogy to wharfage fees charged to vessels using publicly owned wharves. On various occasions this Court has sustained such charges as not coming within the scope of the constitutional prohibition against duties on tonnage. U.S. Constitution Art. I, §10. Such fees have been upheld as charges for the support and maintenance of wharfage facilities justifiably enacted by the owners of such facilities. *Clyde Mallory Lines* v. *Alabama*, 296 U.S.

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[2] The aircraft use tax is obviously " 'an enforced contribution to provide for the support of government' the standard definition of a tax. *United States* v. *LaFranca*, 282 U.S. 568, 572 (1931)." *United States* v. *Tax Commission of Mississippi*, 421 U.S. 599, 606 (1975). The revenue is used "to meet the demands of interstate commerce, the postal service, and the national defense." 49 U.S.C. §1701.

261 (1935); *Vicksburg* v. *Tobin*, 100 U.S. 430 (1879). The fact that the owners of the wharves were public agencies did not deprive them of rights incident to such ownership. "[W]hen compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property." *Packet Co.* v. *Keokuk*, 95 U.S. 80, 85 (1877).

The aircraft use tax cannot be sustained under the rationale that is is a right of property, rather than an assertion of sovereignty. Section 4491 is a tax on the use of navigable airspace. 26 U.S.C. §4492(c). The United States is not the proprietor of the navigable airspace. Rather, the United States, through the Federal Aviation Administration, defines and regulates such airspace in its sovereign capacity. 49 U.S.C. §§1301(24), 1348. *Cf. Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 720-721 (1972).

The designation of the revenue for airport development and expansion does not transform the United States into a proprietor for purposes of analyzing the aircraft use tax. That revenue is distributed in the form of grants to public agencies that do own airports. 49 U.S.C. §1713. Thus even when the focus is shifted from the regulation of navigable air space to the ownership of airport facilities, the user fee characterization remains incorrect. The proprietor of the airport is the State or its political subdivision. While the public agency is the possible recipient of financial assistance, that agency must match the federal grant generally to the extent of 50%. 49 U.S.C. §1717. Thus, in light of the State's own contribution, when its aircraft uses an airport which has received federal funds, it is unfair to suggest that a claim of tax immunity constitutes avoidance of financial responsibilities with re-

spect to federally-assisted improvements.[3] This misconceived consideration appears to have motivated the court of appeals. (A-10, 548 F.2d at 36).

That the aircraft use tax is not properly characterized as the charge of a proprietor is conclusively demonstrated by this Court's treatment of the State motor vehicle registration fee considered in *Carley & Hamilton* v. *Snook*, 281 U.S. 66 (1930). Even though the revenue was used for the construction and maintenance of highways, the Court held that it was not a toll or charge for the use of federally-assisted highways.

> The fact that registration fees are imposed generally upon all residents who use motor vehicles within the state, without reference to any particular highways or to the extent or frequency of their use . . . marks them as demands of sovereignty, not of proprietorship, and likens them to taxes rather than to tolls. 281 U.S. at 73-74.

As the aircraft use tax is imposed on the use of navigable airspace and incidentally public airports "without reference to any particular [federally-assisted airports] or to the extent or frequency of their use", it is clearly the levy of a sovereign and not of a proprietor.

Finally, insofar as any analogy to wharfage fees is appropriate, the relevant comparison is to those considered in *Cannon v. New Orleans*, 20 Wall. 577 (1874). The Court there invalidated a local ordinance which taxed vessels which landed at any point on the river bank irrespective

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[3] While the Commonwealth does not challenge the validity of fees exacted by the Federal Aviation Administration, one of the conditions imposed on the receipt of federal funds is that federal aircraft be able to use the facilities without charge except where such use is substantial. 49 U.S.C. §1718(5).

of whether municipal wharves were used. The tax could not therefore be considered solely as compensation for the use of such wharves. The general tax on the use of navigable airspace suffers from the same infirmity in that the tax is not keyed to the use of federally-assisted airports alone.

It is thus clear the validity of the aircraft use tax cannot be disposed of by means of a user fee classification. The use of such an approach where the sovereign interests of the Commonwealth are directly affected raises a substantial federal question which should be resolved by this Court.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General
S. STEPHEN ROSENFELD
Assistant Attorney General
TERENCE P. O'MALLEY
Assistant Attorney General
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
Tel: (617) 727-1014
Attorneys for the Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GARRITY, J.

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF,
v.
UNITED STATES OF AMERICA,
DEFENDANT.

Civil Action
No. CA 75-221

DEFENDANT'S MOTION TO DISMISS

APPEARANCES:

TERRENCE P. O'MALLEY, *Assistant Attorney General,*
Commonwealth of Massachusetts
373 State House, Boston, Massachusetts 02133,
for the Plaintiff.

DENNIS DONOHUE, ESQ., *United States Department Tax Division.*
1111 Constitution Avenue NW, Washington, D.C. 20530
for the Defendant.

United States Court House
Post Office Square
Boston, Massachusets 02109
3:20 o'clock p.m.
Monday, February 23, 1976

• • •

[2] OPINION

The Court: I think I will decide the matter at this ti. e, partly because the District Court Opinion may well not be the last word on this question, and, therefore, I am not as anxious as I might be under other circumstances to write precisely and at length.

I grant the Motion To Dismiss.

I think that the law is set out correctly in Judge Cannella's Opinion, City of New York against the United States, Southern District of New York, 1975 394 F. Supp. 641. I see no purpose in endeavoring to improve upon that Court's analysis.

The second determinative fact here, in my view, is that the monies raised by this tax, which I think is actually properly classified as a User's Fee, goes into the trust fund. It's a special trust fund earmarked for the expansion of the air transportation system.

If the funds raised went into the general coffers of the Federal Treasury, I think Mr. O'Malley's argument would be stronger. Here, however, not only, as I say, paraphrasing Judge [3] Cannella's reasoning, you have a nondiscriminatory tax and one which I cannot feel could materially handicap any operation of the State Government.

Here you have the classic-use situation, as I see it. The federal program is designed to make the use of helicopters and other aircraft safer. It enables the State's helicopter and aircraft owned by all sorts of other persons and businesses to land on a safe airport rather than in somebody's cabbage patch or chimney. The funds are so intimately tied to the use of the product to which the registration fee attaches that I feel that the levy is properly classified as a User's Fee.

I wondered about its appearance in the Internal Revenue Code, but the answer, at least in my mind, to that fact is

the point I already mentioned, namely, that the funds raised go into a special trust fund whose expenditures are restricted to the Statute.

I can't say a great deal more about it, except that the Motion is allowed and judgment of dismissal will be entered on behalf of the Defendant. That concludes my statement of the decision in this matter.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 75-3987-G

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF
v.
UNITED STATES OF AMERICA,
DEFENDANT

JUDGMENT

The Court having entered its oral decision on February 23, 1976, granting the defendant's motion to dismiss

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff's complaint be dismissed, with prejudice, and that the defendant, United States of America, recover from plaintiff its costs of this action.

SO ORDERED AND ADJUDGED on this 26th day of March, 1976.

s/W. ARTHUR GARRITY
United States District Judge

United States Court of Appeals
For the First Circuit

No. 76-1277.

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF-APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

Terence P. O'Malley, Asst. Atty. Gen., Boston, Mass. with whom *Francis X. Bellotti*, Atty. Gen., Boston, Mass., was on brief, for plaintiff-appellant.

Alfred S. Lombardi, Atty., Tax Div., Dept. of Justice, Washington, D.C., with whom *Scott P. Crampton*, Asst. Atty. Gen., Washington, D.C., *James N. Gabriel*, U.S. Atty., *William A. Brown*, Asst. U.S. Atty., Boston, Mass., *Gilbert E. Andrews, Jr.*, and *Ann Belanger Durney*, Attys., Tax Div., Dept. of Justice, Washington, D.C., were on brief, for appellee.

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

McENTEE, *Circuit Judge*.

The United States imposes an annual tax on the use of all taxable civil aircraft. 26 U.S.C. § 4491. This case involves a challenge by the Commonwealth of Massachusetts to the validity of that annual assessment insofar as it affects the Commonwealth. Specifically, the Commonwealth argued in its suit for a refund in the district court and before us that the tax of $130[1] imposed on it for the use of its state police

[1] The annual rate is $25, plus (for an aircraft of the type involved in this case) "3½ cents a pound for each pound of the maximum certificated takeoff weight." 26 U.S.C. § 4491(a).

The Commonwealth actually sued for a refund in the amount of $183.30, the amount levied by the Internal Revenue Service upon funds of the Commonwealth held by the First National Bank of Boston. This sum includes the underlying tax and also statutorily authorized interest and penalties.

helicopter from July 1, 1970 through June 30, 1971, was unconstitutional as violative of the principle of intergovernmental tax immunity. The district court, however, was not persuaded and dismissed the case for failure to state a claim upon which relief could be granted. We affirm, although on a narrower basis than was relied upon by the court.[2]

In its brief and at oral argument before us the Commonwealth has essentially based its entire case on the theory of intergovernmental tax immunity—a theory which the United States alleges is for all practical purposes moribund if not obsolete. While the discussion by both parties of this venerable[3] concept of constitutional law has been both scholarly and interesting, we need not decide at this time whether the principle "maintains its vitality," as the Commonwealth contends,[4] or whether it is a "doctrine of questionable validity," as the United States asserts.[5] We

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[2] The district court dismissal was based on two, apparently independent, predicates. First, the court found persuasive the analysis of the law of intergovernmental tax immunity which is contained in *City of New York* v. *United States*, 394 F.Supp. 641 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 308 (2d Cir.), *cert. denied*, ___ U.S. ___, 97 S.Ct. 79, 50 L.Ed.2d 87 (1976). But the court also said of the challenged tax that it "is actually properly classified as a User's Fee" and saw the existence of a special trust fund as being particularly relevant in that regard. *See* discussion *infra*.

[3] *See, e.g., Collector* v. *Day*, 78 U.S. (11 Wall.) 113, 20 L.Ed. 122 (1870); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819).

[4] *Compare New York* v. *United States*, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326 (1946) *with National League of Cities* v. *Usery*, ___ U.S. ___, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). *See also Fry* v. *United States*, 421 U.S. 542, 547-48 n. 7, 95 S.Ct. 1792, 44 L.Ed. 2d 363 (1975); Note, Municipal Bankruptcy, The Tenth Amendment and the New Federalism, 89 Harv.L.Rev. 1871, 1873-74 (1976).

[5] *See, e.g., City of New York* v. *United States, supra*. *See also* Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism, 89 Harv.L.Rev. 682, 712 & n. 138 (citing cases). *See generally*, The Remnant of Intergovernmental Tax Immunities, 58 Harv.L.Rev. 757 (1945); Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv.L.Rev. 633 (1945).

are not required to confront this issue because we believe that the tax here at issue is, in reality, a user charge. We view it as "a charge for services rendered [which] represents a quid pro quo, and [which] as such, is outside the scope of the doctrine of implied intergovernmental tax immunity." *Texas* v. *United States*, 72-2 U.S. Tax Cas. ¶ 16,047 (W.D.Tex. 1972), *aff'd*, 73-1 U.S. Tax Cas. ¶ 16,085 (5th Cir. 1973). *See also New York* v. *United States*, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326 (1946); *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 265-66, 56 S.Ct. 194, 80 L.Ed. 215 (1935); *Head Money Cases*, 112 U.S. 580, 5 Ct. 247, 28 L.Ed. 798 (1884); *Vicksburg* v. *Tobin*, 100 U.S. 430, 432-33, 25 L.Ed. 690 (1879); *Packet* v. *Keokuk*, 95 U.S. 80, 24 L.Ed. 377 (1877). *Cf. Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972); *Cannon* v. *New Orleans*, 87 U.S. (20 Wall.) 577, 581-82, 22 L.Ed. 417 (1874).

In 1970 Congress enacted both the Airport and Airway Development Act of 1970, P.L. 91-258, 84 Stat. 219, and the Airport and Airway Revenue Act of 1970, P.L. 91-258, 84 Stat. 236. These two acts were considered together and were passed simultaneously. In their combined form they are commonly referred to as the Airport and Airway Development and Revenue Acts of 1970, Act of May 21, 1970, P.L. 91-258, 84 Stat. 219. Title I of the combined act provides for the expansion and development of various air transportation programs, and Title II deals with the raising of revenue to fund such programs. Various user charges were established by Congress as a partial source of this needed revenue. It is abundantly clear from the legislative history of the Acts that Congress intended the tax imposed by § 4941[6] to be part of this overall scheme of user charges.

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[6] In our view, the fact that this tax is codified in the Internal Revenue Code (26 U.S.C.) is irrelevant to the question of whether or not it is in reality a user charge.

Purely by way of example, we may cite the following language from the House Report:

> "[T]he Ways and Means Committee has decided to also establish a schedude of annual registration taxes for both commercial and general aviation aircraft. . . . It appears appropriate to impose some direct user charge on air carriers themselves in addition to the increased taxes on air passengers and air shippers, since air carriers presently are not paying a direct user tax with respect to the use of the aviation system. The aircraft registration fee is based upon the premise that all aircraft should pay a basic fee as an entry fee to use the system." H.R.Rep. No. 91-601, 91st Cong., 2d Sess., 1970 U.S.Code Cong. & Admin. News, pp. 3047, 3085.

[1] Of course, the fact that an assessment is *labeled* a user charge is not of itself conclusive. *Cf. Packet Co.* v. *Keokuk, supra,* 95 U.S at 86, 24 L.Ed. 377. Rather "[i]t is the thing, and not the name, which is to be considered." *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 314, 13 L.Ed. 996 (1851). But in this instance the term "user charge" well describes the essence of the challenged assessment. The revenue raised by this charge is applied directly to benefit those who must pay the charge. "The sum demanded . . . is not, therefore, strictly speaking, a tax or duty within the meaning of the Constitution. The money this raised . . . is appropriated in advance to the uses of the statute, and does not go to the general support of the government." *Head Money Cases, supra,* 112 U.S. at 595-96, 5 S.Ct. at 252.

In *Packet Co.* v. *Keokuk, supra,*[7] the Supreme Court

[7] The *Keokuk* case concerned a challenge to wharfage fees charged (on a per ton basis) by a municipal corporation. The Supreme Court rejected the argument that such fees contravened the constitutional prohibition against a state "lay[ing] any duty of tonnage" (U.S. Const. art. I, § 10).

explained why such charges are readily distinguishable from general taxes:

> "To determine whether the charge prescribed by the ordinance in question is a duty of tonnage, within the meaning of the Constitution, it is necessary to observe carefully its object and essence. . . . [A] charge for services rendered or for conveniences provided is in no sense a tax or a duty. . . . It is a tax or a duty that is prohibited: something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. . . . [A]nd, when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property." 95 U.S. at 84-85, 24 L.Ed. 377.

[2] The applicability of the *ratio* of the *Keokuk* case to the case at bar is clear. In each instance the challenged tax—when "its object and essence" is observed—is demonstrably "a charge for services rendered." *Id.* at 84, 24 L.Ed. 377. It is uncontested that the moneys raised by the tax at issue here will result in improved airports and airways, which improvements will be beneficial to all users. There is simply no indication that the challenged registration tax is anything more than a relatively miniscule assessment to help finance "services rendered to and enjoyed by" aircraft generally. *Clyde Mallory Lines* v. *Alabama, supra,* 296 U.S. at 266, 56 S.Ct. at 196.

An additional feature of the legislation establishing the tax at issue here which reinforces our view that it is a user charge is Congress's establishment of an Airport and Airway Trust Fund. This trust fund is the repository, *inter alia,* of funds raised under 26 U.S.C. § 4491. *See* 49 U.S.C. § 1742. It was created "in order to insure that

the air user taxes are expended only for the expansion, improvement, and maintenance of the air transportation system." H.R.Rep. No. 91-601, 91st Cong., 2d Sess., 1970 U.S.Code & Admin.News, pp. 3047, 3085. The existence of this fund reflects the "direct relationship between the use of the system and the money generated to meet the needs required by the users." *Id.* at p. 3049.

Accordingly, whatever might be the current state of the law regarding intergovernmental tax immunity, we are convinced that "[n]othing in the historical basis of dual sovereignty underlying the principle of state immunity from federal taxation requires that the states continue to receive the benefit of airway facilities and services actually used by the states but furnished by the Federal Government without bearing their equitable share of the costs incurred in providing those particular benefits.... No logical reason exists why all users of the air transportation system should not pay their fair share of such costs." *Texas* v. *United States, supra.*

Affirmed.

United States Court of Appeals
For the First Circuit

No. 76-1277.

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF, APPELLANT,
v.
UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

JUDGMENT
Entered January 28, 1977

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
(s) DANA H. GALLUP, *Clerk.*

[cc: Messrs. O'Malley and Lombardi.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action
No. 75-1155A

STATE OF GEORGIA, DEPARTMENT OF TRANSPORTATION,
PLAINTIFF,
v.
UNITED STATES OF AMERICA,
DEFENDANT

JUDGMENT

This action having come on for consideration by the Court, Honorable Richard C. Freeman, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered granting Plaintiff's motion for summary judgment and denying Defendant's motion for summary judgment, and timely appeal having been taken by Defendant to the United States Court of Appeals for the Fifth Circuit, and this Court having received the court's subsequent order vacating the judgment of this Court and remanding the referenced cause to this Court in order that this Court might enter a new judgment from which direct appeal to the Supreme Court might be taken,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that this Court's judgment dated January 25, 1977 and entered *nunc pro tunc* December 30, 1976 is hereby vacated and set aside, and that judgment be and the same hereby is entered in favor of Plaintiff, State of Georgia, Department of Transportation against Defendant, United States of America, in the amount of $4,110.52 in tax and $191.70 assessed interest for a total amount of $4,302.22, plus in-

terest according to law from July 26, 1971, and that the Plaintiff also recover of the Defendant its costs of this action.

This 13th day of April, 1977.

s/RICHARD C. FREEMAN
United States District Judge

CONSENTED TO AS TO FORM:

MYRON C. BAUM
Acting Asst. Atty. Gen.
Tax Division
GILBERT ANDREWS
Chief, Appellate Section
GIL ROTHENBERG
Asst. Atty. Gen.
JOHN W. STOKES, JR.
United States Atty.
By: s/SHERMAN D. JOHNSON
SHERMAN D. JOHNSON
Asst. United States Atty.
Attorneys for Defendant

ARTHUR K. BOLTON
Atty. Gen.
ROBERT S. STUBBS, II
Exec. Asst. Atty. Gen.
s/RICHARD L. CHAMBERS
RICHARD L. CHAMBERS
First Asst. Atty. Gen.
s/H. PERRY MICHAEL
H. PERRY MICHAEL
Senior Asst. Atty. Gen.
s/DAVID A. RUNNION
DAVID A. RUNNION
Asst. Atty. Gen.
Attorneys for Plaintiff